

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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|---------------------------|---|---------------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | CRIMINAL NO. <u>23-01423 KG</u> |
| |) | |
| vs. |) | |
| |) | |
| MICHAEL DAVID FOX, |) | |
| |) | |
| Defendant. |) | |

UNITED STATES' OPPOSED MOTION TO CONTINUE SENTENCING

The United States requests a one-week continuance to hold the sentencing hearing in this case because neither the assigned Assistant U.S. Attorney nor the official victim is available to appear at the sentencing hearing on that date. Defendant Michael David Fox, who is out of custody and currently at Diersen Charities halfway house, opposes this motion.

PROCEDURAL HISTORY

On September 20, 2023, The Defendant pleaded guilty to 18 U.S.C. § 875(c), Interstate Transmission of Threatening Communication. The U.S. Probation Office released the Pre-Sentence Report on November 14, 2023. Doc. 31. On November 29, 2023, the District Court scheduled the sentencing hearing in this case to be held on December 14, 2023. On November 30, 2023, the United States filed objections to the pre-sentence report and moved for an evidentiary hearing to prove that U.S.S.G. § 3A1.1 applies to the offense of conviction, and the Defendant should receive a 3-level enhancement at sentencing for intentionally selecting the victim because he mistakenly believed that she was transgender.

BASIS FOR CONTINUANCE

Undersigned counsel, who is the most familiar with the investigation, the official victim, and the overall case history, is a servicemember in the U.S. Army and will be on military orders from December 3-16, 2023. The official victim in this case is a current U.S. Congressperson and anticipates that the U.S. House of Representatives will be voting on December 14, 2023, as well, and therefore the official victim will not be available. Accordingly, the United States requests that the Court continue the sentencing for this case to the week of December 18-22, 2023. The official victim intends to allocute at the sentencing in this case and exercise their rights under the Crime Victims Right Act, 18 U.S.C. § 3771.

ARGUMENT

The Defendant's Right to a Speedy Trial under the Sixth Amendment to the U.S. Constitution and 18 U.S.C. § 3161 end upon conviction. Betterman v. Montana, 578 U.S. 437 (2016). Unlike the rigid guidelines under 18 U.S.C. § 3161, the U.S. District Court must impose a sentence in a criminal case after conviction without "unnecessary delay." Fed. Rule Crim. Proc. 32(b)(1). Here, both the assigned attorney and the official victim of the crime are unavailable on December 14, 2023, for sentencing. "A crime victim has the following rights: . . . the right to not be excluded from any such public court proceeding. . . the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. . ." 18 U.S.C. § 3771(a)(3), (a)(4). The United States is requesting a brief continuance of up to one week. A continuance is reasonable under the circumstances—most notably because the Defendant's guideline sentence includes a period of confinement between 6-18 months depending on the Court's resolution of the United States' sentencing motion.

CONCLUSION

For all the reasons stated above, the United States respectfully requests that the Court grant the United States' motion for a continuance to hold the sentencing hearing. The United States is available for sentencing anytime during the week of December 18-22, 2023.

Respectfully submitted,
ALEX M.M. UBALLEZ
United States Attorney

Electronically filed 12/5/2023
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I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

Electronically filed on 12/5/2023
SARAH M. DAVENPORT for
LINDY CARPENTER
Assistant United States Attorney